Supreme Court, U.S.
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No. 99-1464

In The

Supreme Court of the United States

E.I. DUPONT DE NEMOURS AND COMPANY and GOODSILL ANDERSON QUINN & STIFEL,

Petitioners,

v.

SHARON MURAKAMI and HARVEY TOMONO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents are individual farmers from Hawaii whose businesses and farms were catastrophically injured by use of a contaminated plant fungicide sold by Petitioner DuPont. In 1994, Respondents and Petitioner DuPont settled product liability actions.[1] At that time the parties entered a venue agreement expressing the Third Circuit state court of Hawaii "shall retain jurisdiction to resolve any disputes . . . relating to this action," which condition was directly incorporated into Rule 41 Stipulations of Dismissal submitted by the parties, duly approved by the trial court and filed as the final orders concluding those product liability actions. A-3 to 4.

Notwithstanding the agreement regarding venue, when Respondents subsequently filed an action in that same state court against Petitioner DuPont, seeking damages for fraudulent inducement of the product liability settlements, Petitioners removed that action to federal district court. [Petitioners call this the "Fraudulent Inducement Case"; (Petition at p. 2). The action was removed, and remanded, first for the absence of diversity, see Appendix G, A-30 to 45, and on subsequent removal remanded due to the absence of any federal question. (Remanded June 18, 1998, in an unreported opinion holding that Respondents' claims for relief pursuant to

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[1] Today and at all relevant times, Petitioner Goodsill has served as counsel to Petitioner DuPont.

Hawaii Revised Statutes 603-21.9(1) and (6) do not establish a basis for federal jurisdiction). For a general description of events giving rise to the Fraudulent Inducement Case and related litigation, see A-3 to 5; A-59 to 64.]

After the Fraudulent Inducement Case was removed, Respondents moved the Third Circuit state court to enforce the Stipulation as an exclusive designation of venue, contending both DuPont and its counsel should be subject to the contempt authority of the state court to enforce the stipulated condition. See Appendix I (arguing intentional breach by Petitioners, A-65; asserting Hawaiian statutory authority for relief in coercive contempt, A-72; identifying authority to grant requested contempt sanctions against counsel for litigants, A-77.)

Respondents also moved for permanent injunctive relief on the same grounds. See Appendix J.

Throughout the litigation, the parties and the Courts have generally designated these Contempt and Injunctive Relief actions as the "Special Proceedings." A-5. Petitioners' Writ redenominates the actions as the "Wrongful Removal Cases." (Petition at p. 2).[2] That misnomer reveals a central flaw in Petitioners' arguments – Petitioners treat the Special Proceedings as some form of civil action of unidentified elements and remedy, when in fact those Special Proceedings were simply motions to enforce compliance with a voluntarily entered stipulation of venue, applying the state court's contempt and injunctive authority. Petitioners further err by comparing the consequences of the venue agreement to circumstances in

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[2] Respondents will use both terms interchangeably.

which a party's access to federal court is denied by events beyond the party's control, rather than recognizing the voluntary aspect of waiver inherent in Petitioners' own conduct. Finally, Petitioners err by failing to recognize the limits of authority available to a federal court whose subject matter jurisdiction has been successfully challenged.

Petitioners' "Statement of the Case" (Petition at p. 2), does not identify the action filed by Petitioners against Respondents in federal court, *E.I. DuPont de Nemours & Company v. Exotics Hawaii Kona, Inc., et al.*, Civil No. 97-01185 DAE, filed September 7, 1997. That action, seeking both damages and an injunctive bar against Respondents' original state court action, is still pending and is also subject to Respondents' Special Proceedings. See A-28 (District Court recognizes Special Proceedings were intended to enjoin Petitioners from "prosecuting or defending any claims in federal court.")[3]

Petitioners removed each of the Special Proceedings to federal court as soon as they were filed in the Third Circuit state court. After removal, Respondents moved for remand, challenging the assertion of diversity jurisdiction over claims involving the non-diverse Petitioners Goodsill, Anderson, Quinn and Stifel (Goodsill). Goodsill was named as a party to the proceedings because they repeatedly, knowingly, participated in removing state court proceedings to federal court in contravention of the

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[3] Petitioners have instituted a second federal action violating the forum agreement, captioned *E.I. DuPont de Nemours and Company v. Andraea Partners, et al.*, Civil No. CV 99 00750 ACK-BMK, filed October 28, 1999.

parties' designation of the state court as venue for subsequent related litigation.

Respondents' Special Proceedings relied exclusively on the state court's contempt power as authority to enforce the venue designation. See A-72; A-90. However, considering only the viability of any potential federal causes of action, the district court found Goodsill had been fraudulently joined. On the same analysis, the court later granted dismissals with prejudice in the actions. Respondents then appealed, citing the lack of diversity subject matter jurisdiction and alleging the District Court had abused its discretion by failing to consider the viability of claims under the law of Hawaii against Goodsill.

No grant of certiorari is necessary in these actions, as the Ninth Circuit Court of Appeals correctly analyzed the fraudulent joinder issue using the state law on which claims were asserted. Finding those claims to be potentially viable, the Ninth Circuit determined that neither diversity nor federal question jurisdiction existed, and so, the federal court was an improper forum to resolve the merits of the allegations; those determinations were to be made instead in a state court with jurisdiction.

The only allegation at issue or implicated in the Special Proceedings is whether the authority of the state court, which derives from state statutes and constitution, was potentially violated by Petitioners' repeated breaches of the venue agreement/Stipulated Order.

The instant proceedings are peripheral in nature to the primary dispute between the parties, which involves egregious litigation misconduct, amounting to fraud on the court. See generally, *Kawamata Farms, Inc., et al. v. E.I.*

DuPont de Nemours & Company, 86 Haw. 214, 948 P.2d 1055 (Haw. Sup. Ct., 1997) (affirming sanctions and penalty for discovery conduct amounting to fraud on the court).[4] It is Respondents' Fraudulent Inducement Case which seeks remedy for the injury suffered when Respondents settled their product actions before the true nature and scope of DuPont's misconduct was revealed.[5] However, the Special Proceedings seek to vindicate an important aspect of the agreement between the Petitioners and Respondents: venue for litigation has been validly designated in the Third Circuit state court of Hawaii.

The narrow issue presented in the proceedings subject to the writ for certiorari is simply whether a state court has authority, independent of the "federal procedural common law" on which Petitioners rely, to enforce compliance with voluntary venue agreements of parties which have been memorialized and fully incorporated as conditions in Stipulated Orders of Dismissal. Because the answer to that question is yes, as correctly held by the Ninth Circuit Appeals Court, certiorari is unnecessary.

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[4] Respondents' original product liability actions were consolidated for discovery purposes with the *Kawamata* action; Respondents settled their claims before the *Kawamata* action went to trial.

[5] Both the Ninth Circuit Court and Delaware Supreme Court have ruled release of the product liability claims does not bar these Respondents from asserting subsequent claims for fraudulent inducement. *See Matsuura v. Alston & Bird*, 166 F.3d 1006, 1007 (9th Cir. 1999) *(petition for certiorari withdrawn)*; *E.I. DuPont de Nemours and Company v. Florida Evergreen Foliage*, 744 A.2d 457 (Del. Sup. Ct., Dec. 6, 1999).

REASONS FOR DENYING THE PETITION

The Ninth Circuit Court of Appeals applied the correct analysis and correctly resolved the matter before it. First, regarding the "fraudulent joinder" of Goodsill, the Court correctly recognized that the controlling standard required examination whether any colorable claim was alleged under state law against the non-diverse party. If so, diversity could not be established. Second, the Court properly recognized that, absent subject matter jurisdiction, a federal court cannot enter valid orders resolving the very merits of claims between the parties.

A. Hawaiian State Law Controls The Viability of Claims Asserted Against Goodsill.

The Ninth Circuit properly resolved the fraudulent joinder issue. Contrary to Petitioners' claims (Petition at p. 12), *the Ninth Circuit court did not conclude state law controls the general question whether removal is appropriate.* Instead, recognizing that the controlling standard was "whether the plaintiff failed to state a claim against the resident defendant under the settled law of the state," that Court held "[w]e cannot conclude that plaintiff's action obviously failed to state a claim against Goodsill." A-8. Thus, the first step taken by the Ninth Circuit was recognition that Goodsill, a non-diverse party, was properly joined. Therefore, federal diversity subject matter jurisdiction could not be exercised over the Special Proceedings.[6]

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[6] Each court considering the issue has determined that necessary elements for federal question jurisdiction are not presented by the Special Proceedings.

Of course parties can contract to litigate particular claims in a specified venue. Such clauses represent the agreement of the parties, and may serve as waiver of a party's right to remove. *Pelleport Investors v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 279-81 (9th Cir. 1984).

The statutory right to remove pending state litigation to federal court is an important right, but it is susceptible to waiver. *Aynesworth v. Beech Aircraft Corp.*, 604 F.Supp. 630, 637 (W.D. Tex. 1985); see also *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216-17 (3rd Cir. 1991) (waiver of right to remand determined from interpretation of contract applying routine rules of contractual construction); *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 16 (5th Cir. 1991) (allowing right to remove would render language of forum selection clause illusory); *Archdiocese of Milwaukee v. Underwriters at Lloyd's, London*, 955 F.Supp. 1066, 1068-69 (E.D. Wis. 1997) (right to remove may be waived, exercised, or bargained away; however, removal denies one court subject matter jurisdiction in favor of another); *Wats 800, Inc. v. Voice America*, 867 F.Supp. 811, 812 (S.D. Ind. 1993) (forum selection clause may confer sole jurisdiction). A waiver of the right to remove actions has never been considered in itself a basis of federal question jurisdiction, as Petitioners assert should be the case.

Moreover, when, as in this case, a jurisdictional stipulation/venue agreement is properly incorporated into a Rule 41 Stipulation of Dismissal, the agreement acquires a special, judicially enforceable character of exclusivity. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994)

(retention of jurisdiction by court and parties in stipulated order of dismissal is enforceable);[7] *Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) (circumstances of post-litigation agreement specifying jurisdiction is retained for future enforcement of disputes relating to settlement agreement justifies interpretation that retained jurisdiction was meant to be exclusive).

As demonstrated by the authorities they rely on in their Writ, Petitioners seemingly ignore or are oblivious to the effect of a voluntary waiver of the statutory right to remove or file originally in federal court. The Ninth Circuit recognized this shortcoming in arguments there when it stated that "Donovan [v. City of Dallas] does not involve the effect of a contractual forum selection clause." A-9.

Respondents' Special Proceedings allege both Petioners DuPont and Goodsill breached a valid, judicially enforceable Order issued by the state court. The Ninth Circuit Court correctly determined that even a party's attorney may be subject under state law to the contempt authority of the state court. Therefore, colorable claims were alleged and joinder of Goodsill was not fraudulent.

Although Petitioners insist the Ninth Circuit improperly turned to state law to resolve a federal issue, in fact the Ninth Circuit properly followed accepted federal practice to resolve the fundamental question of jurisdiction when non-diverse parties are included in a removed

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[7] Notably, the venue-designating language at issue exactly matches the language approved in *Kokkonen*.

action. Hawaiian state statutes were the basis of claims asserted against Goodsill by Respondent. It was the district court which erred when it looked only to federal statutory and procedural authority when deciding the fraudulent joinder issue. By failing to ask whether Goodsill might be subject to a viable claim under state law, and so was properly joined, the federal court abused its discretion by applying the wrong law. A-7 to 8.

B. Hawaiian State Law Governs The Viability of Claims Asserted Against Goodsill.

Having found no basis on which federal subject matter jurisdiction existed, the Ninth Circuit properly ruled that any determination on the merits of Respondents' claims "should have been decided by the courts of Hawaii" – courts of full jurisdiction. A-8.

Federal procedural law cannot govern in a matter which relies solely on state authority and for which there is no federal subject matter jurisdiction.

The "merits" issue is unique in these actions as it is fully intertwined with the question of jurisdiction. The same question – whether Petitioners violated a binding venue agreement – addresses both the questions whether Goodsill was subject to viable claims, and the ultimate merits of claims asserted in the Special Proceedings against both Petitioners. Because the question whether Goodsill was properly joined goes to subject matter jurisdiction of the federal court, a threshold issue, the federal court was obliged to resolve that matter first, before addressing the merits of the claim.

The Ninth Circuit correctly found that Goodsill could be subject to the authority of the state court for violation of a court order. Then, unlike the district court, the Ninth Circuit declined to consider Goodsill's defenses on the merits to the allegation. Following the rule that a "finding of fraudulent joinder is improper if the defendant's assertions go to 'the merits of the action as an entirety, and not to the joinder,' " A-7, (quoting *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 153-54 (1914), the Ninth Circuit ruled Goodsill's status as a named party "deprived the district court of subject matter jurisdiction to render a decision on the merits." A-9.

Absent basic jurisdiction, the federal court could not employ federal law to then "govern" the merits issues. As Petitioner's themselves state: [C]onstruction of a jurisdiction clause may be a matter of state law when a state court is the forum making the procedural determination." (Petition at p. 23).

Forum selection clauses are not correctly considered a challenge to basic subject matter jurisdiction; rather, they address the procedural matter of venue. *Talatala v. Nippon Yusen Kaisha Corporation, et al.*, 974 F.Supp. 1321, 1324 (D. Haw. 1997). Even as a procedural matter, interpretation and construction of a forum selection clause requires exercise of subject matter jurisdiction by a federal court. See *Pelleport Investors, Inc. v. Budco Quality Theaters, Incorporated*, 741 F.2d 273, 278 (9th Cir. 1984) (existence of subject matter jurisdiction is a condition precedent to district court's ability to construe or enforce a forum selection clause).

Normally, federal courts construing venue designations do not simultaneously face challenges to subject matter jurisdiction, and are not required to first employ the test for fraudulent joinder separate from and before resolving the venue matter.

In every case cited by Petitioners in footnotes 8, 9, and 10, for the proposition that federal common law governs the construction of a venue designation, the federal court possessed unchallenged jurisdiction to proceed to the merits of the venue issue, and not once was examination of the forum selection clause *entangled* with the question of jurisdiction. See, e.g., *International Software Systems, Inc., v. Amplicon, Inc.*, 77 F.3d 112, 113 (5th Cir. 1996) (removal based on diversity jurisdiction challenged as to venue on basis of forum selection clause); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3rd Cir. 1995) (subject matter jurisdiction exists over action satisfying amount in controversy and diversity requirements; forum selection clause impacts determination of appropriate venue).

Thus, each of those courts reasonably turned to federal procedural law when deciding the procedural matter of venue. Those authorities are inapplicable here, because the district court was faced with a threshold challenge to its own jurisdiction, which required it to first examine the propriety of joinder of Goodsill. The district court improperly combined that determination with a determination on the merits, which resulted in a reversal when the Ninth Circuit, unquestionably employing the correct analysis for fraudulent joinder, concluded the absence of jurisdiction precluded any consideration of the merits of allegations against Goodsill.

CONCLUSION

For the reasons discussed above, Petitioners' request for certiorari should be denied.

In this case, the district court erred by analyzing claims of fraudulent joinder without even once considering the viability of Hawaiian state law claims asserted against the non-diverse party. The district court further erred by exercising jurisdiction to interpret the forum selection clause, before subject matter jurisdiction was established. The interpretation itself was erroneous because the court failed to consider the post-litigation circumstances of the execution of the clause, or the fact that the venue designation was incorporated within a filed document having judicial character and enforceable as a court order.

The forum selection clause at issue, entered post-litigation and adopted and ratified by the court, was effective to create exclusive jurisdiction in the state court, and furthermore, has the character of a court order which can be enforced by the state court's civil contempt authority. Goodsill was not fraudulently joined, and no jurisdiction existed for any further orders by the District

Court. The determination of the Ninth Circuit in this matter should be left undisturbed.

Respectfully submitted,

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